54

CORRECTED COPY

(4)

No. 06-1410

Supreme Court, U.S.
FILED
JUN 2 2 2007
OFFICE OF THE CLERK

In The

Supreme Court of the United States

STATE OF IDAHO,

Petitioner,

v.

KRISPEN ESTRADA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Idaho

RESPONDENT'S BRIEF IN OPPOSITION

MOLLY J. HUSKEY
State Appellate Public Defender
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342 2831

QUESTION PRESENTED

Should the United States Supreme Court deny the State of Idaho's Petition for Writ of Certiorari because the question presented asks this Court to render an advisory opinion deciding a constitutional question?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	7
ARGUMENT	9
A. The State of Idaho's Assertion That There Are No Opinions Of This Court Which Address The Scope Of The Adverse Inference Rule In Routine Sentencing Proceedings Is Incorrect	9
B. Because An Idaho Statute Cited By The Supreme Court Of The State Of Idaho Supports That Court's Definition Of The Scope Of The Right Against Self-Incrimination In Idaho Sentencing Proceedings, This Court Would Be Rendering An Advisory Opinion On The Fifth Amendment Question Presented	12
C. Because The Idaho Supreme Court Did Not Explicitly Address – And Did Not Need To Address – The Adverse Inference Issue The State Raises, This Court Should Not Provide An Advisory Opinion On The Issue	15
D. Review Of The Case Law Cited By The State Of Idaho Does Not Support Its Claim That There Is A "Widely Divergent" Conflict Of Authority Necessitating The Granting Of The Petition Of Certiorari In This Case	23

TABLE OF CONTENTS – Continued

Page

1. This Case Does Not Provide A Proper Vehicle To Address The Question Of Whether A Defendant Can Invoke His Right Against Self-Incrimination And Still Receive A Reduced Sentence 23

2. Three Of The Five States Which The State Of Idaho Asserts Limit The No Adverse Inference Rule To The Facts Of The Crime Have Not Actually Done So 26

3. Because The Two States Which Have Held That Adverse Inferences Can Be Taken In Regards To Facts Other Than Facts Of The Crime Predate This Court's Opinion In *Cunningham v. California* They Do Not Provide A Current Conflict Of Authority 28

E. Review Of The Question Presented Should Be Reserved For A Case In Which A Defendant Actually Invokes The Right Against Self-Incrimination And Was Punished As A Result 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abie State Bank v. Bryan, 282 U.S. 765 (1931) 22

Apprendi v. New Jersey, 530 U.S. 466 (2000) .....*passim*

Coleman v. Thompson, 501 U.S. 722 (1991) 13

Cunningham v. California, ___ U.S. ___, 127 S.Ct. 856 (2007) 28, 29

Estelle v. Smith, 451 U.S. 454 (1981) 7, 9, 16

Flast v. Cohen, 392 U.S. 83 (1968) 13

Harris v. United States, 536 U.S. 545 (2002) 11

Illinois v. Gates, 462 U.S. 213 (1983) 15

Lee v. State, 36 P.3d 1133 (Wyo. 2001) 28

Michigan v. Long, 463 U.S. 1032 (1983) 13, 21

Mitchell v. United States, 526 U.S. 314 (1999) .....*passim*

People v. Brady, 765 N.E.2d 289 (N.Y. 2002) 27, 28

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 10

Rita v. United States, 551 U.S. ___ (2007) 11

State v. Aikman, 26 P.3d 1276 (Kan. Ct. App. 2001) ...26, 27

State v. Anderson, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997) .....*passim*

State v. Doe, 140 Idaho 271, 92 P.3d 521 (Idaho 2004) 20

State v. Ernst, 699 N.W.2d 92 (Wis. 2005) 28

State v. Heffern, 130 Idaho 946, 950 P.2d 1285 (Idaho Ct. App. 1997) 14, 21

State v. Heffran, 384 N.W.2d 351 (Wis. 1986) 27, 28

TABLE OF AUTHORITIES – Continued

Page

State v. Muscari, 807 A.2d 407 (Vt. 2002) 28

State v. Spencer, 70 P.3d 1226 (Kan. Ct. App. 2003) 26, 27, 28

State v. Stover, 140 Idaho 927, 104 P.3d 969 (Idaho 2005) 25

State v. Wilkins, 125 Idaho 215, 868 P.2d 1231 (Idaho 1994) 20

State v. Young, 122 Idaho 278, 833 P.2d 911 (Idaho 1992) 20

Strickland v. Washington, 466 U.S. 668 (1984) 17

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 467 U.S. 138 (1984) 15

United States v. Raines, 362 U.S. 17 (1960) 24

STATUTES

I.C. § 18-6104 24

I.C. § 19-2513 25

I.C. § 19-2521 ..... 21, 25

I.C. § 19-3003 ..... *passim*

OPINIONS BELOW

The opinions of the Idaho District Court, Idaho Court of Appeals, and Supreme Court of the State of Idaho appear in the Petitioner's Appendix pages 1-48. In addition, the opinion of the Supreme Court of the State of Idaho appears at 143 Idaho 558, 149 P.3d 833 (Idaho 2006).

JURISDICTION

The Petitioner has invoked the jurisdiction of the Court under Title 28, United States Code, Section 1257(a) which authorizes, in part, this Court's review of final judgments or decrees rendered by the highest court of a state in which a decision could be had and in which any right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The only constitutional provision asserted by the Petitioner here involved is that portion of the Fifth Amendment of the United States Constitution which provides, "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.

STATEMENT OF THE CASE

In the criminal action which underlies this post-conviction action, Mr. Estrada pled guilty to a single

charge of rape. (R., p.6.) The district court ordered Mr. Estrada to undergo a psychosexual evaluation. (State's Request for Judicial Notice During Post-Conviction Proceedings, p.70.) Prior to completing the evaluation, Mr. Estrada wrote to the district court asking to be sentenced and indicating that he did not wish to wait for a psychosexual evaluation to be prepared. (Petitioner's Exhibit, No.2.) Mr. Estrada's trial counsel then wrote to Mr. Estrada stating, "The court ordered a psycho-sexual evaluation and it has not been completed. Unless Judge Higer decides that he no longer needs the report, it must be completed before you are sentenced." (Petitioner's Exhibit, No.3.) Trial counsel subsequently received a letter from the evaluator which indicated that Mr. Estrada was reluctant to participate in the psychosexual evaluation and had not completed "assessments and information gathering material." (Petitioner's Exhibit, No.4.) Counsel then wrote to Mr. Estrada stating,

> I understand that you do not want to participate in the evaluation. The evaluation was however, ordered by Judge Higer. We would not want the judge to consider your lack of cooperation to mean that you are not willing to comply with court orders. Please consider cooperating with [the evaluator] during the evaluation process.

(Petitioner's Exhibit, No.5.)

Mr. Estrada relented, participated in the process, and a report was ultimately created. (Petitioner's Exhibit, No.G.) During Mr. Estrada's sentencing hearing, the district court relied extensively upon the evaluation. (R., pp.54-55.) The sentencing court found that the evaluation gave it "little hope that rehabilitation is an appropriate matter for me to consider. . . ." (R., pp.54-55.) In addition,

the court noted that the evaluator's conclusion that "a pattern of violence is well established" wasn't based upon a record of violence, but rather upon the testing that was done. (R., p.73.) The sentencing court imposed a unified sentence of life, with twenty-five years to be served before consideration for parole. (R., p.76.)

In this post-conviction action, Mr. Estrada asserted, in part, that he received ineffective assistance of counsel when his attorney failed to inform him that he was not required to submit to a psychosexual evaluation or that he could assert his right against self-incrimination, and when he permitted Mr. Estrada to participate in the evaluation without knowledge of what the results would be. (R., pp.7, 90.) He asserted that he was prejudiced because there was a reasonable probability that he would have received a more favorable sentence had the sentencing court not considered the evaluation. (R., pp.11, 91.)

The post-conviction court found that Mr. Estrada's counsel had rendered deficient performance, but Mr. Estrada did not suffer prejudice as a result. (Pet. App. pp.40-47.) The court held that had Mr. Estrada invoked his right against self-incrimination an adverse inference "bearing upon remorse, his amenability to treatment, and/or his risk to the community" could have been taken without violating the Fifth Amendment. (Pet. App. pp.42-44.) The court further found that, pursuant to Idaho's violent sexual predator statutes, an adverse presumption of dangerousness would have been taken by the sentencing court, and that a sentencing court could, under Idaho sentencing law, consider the invocation of the right against self-incrimination as a minimization of culpability for the crime. (Pet. App. pp.43-47.) Finding that the attorney's deficient performance did not impact the sentence imposed, the

district court denied Mr. Estrada post-conviction relief. (Pet. App. p.47.)

On appeal, Mr. Estrada asserted that his attorney had acted deficiently and that he had a Fifth Amendment right not to incriminate himself during the sentencing process. (Appellant's Brief, pp.8-11.) In addition, he asserted that he was prejudiced by his attorney's deficient performance because "he was forced to participate in a psychosexual evaluation that was later used against him in sentencing, and because he would have received a lesser sentence had the report not been considered." (Appellant's Brief, pp.12-13; Appellant's Reply Brief, pp.30-35.) In addition, Mr. Estrada asserted that there were statutory sentencing factors for which the State bore the burden and applying any presumptions that these had been met would violate his Fourteenth Amendment right to due process. (Appellant's Brief, pp.16-22.)

In response to Mr. Estrada's assertions, the State argued that Mr. Estrada's trial counsel did not render deficient performance because "Fifth Amendment protections do not extend to the presentence psychosexual evaluation the trial court considered . . . ." (Respondent's Brief, pp.9-16.) The State also argued that, pursuant to state sentencing law, it did not have a burden to prove anything beyond the facts of the crime to justify the sentence imposed and, had Mr. Estrada not participated in the evaluation, the district court could have taken adverse inferences from his silence without violating his Fifth Amendment rights. (Respondent's Brief, pp.14-22.) Finally, the State alleged that the Fourteenth Amendment due process rights asserted by Mr. Estrada were "irrelevant" because the statements made by Mr. Estrada "did not act

as a jury trial waiver or effect [sic] a guilty plea." (Respondent's Brief, pp.19-23.)

The Idaho Court of Appeals determined that Mr. Estrada did have a Fifth Amendment right against self-incrimination which could be asserted during a sentencing hearing. (Pet. App. pp.18-21.) The court further recognized that Idaho Code section 19-3003 applied to sentencing proceedings and prevented the taking of adverse inferences from a defendant's assertion of a right to silence. (Pet. App. pp.21-22.) The court also found that these statutory and constitutional rights could likewise be asserted during a presentence mental health evaluation. (Pet. App. pp.22-26.) However, in the absence of a prior appellate opinion directly on point, the Court determined that it was not deficient performance for Mr. Estrada's trial attorney to fail to inform Mr. Estrada of the right as counsel could not have predicted the future development of the law. (Pet. App. pp.29-30.)

Mr. Estrada filed a Petition for Review and asked the Supreme Court of the State of Idaho to review the decision of the district court. This petition was granted as to the issues presented in the appeal. (Order Granting Petition for Review, filed February 21, 2006.)

On review, Mr. Estrada specifically asserted that in the absence of the psychosexual evaluation the State had failed to meet its burden under Idaho's sentencing criteria statute to justify the sentence actually imposed. (Appellant's Brief on Review, pp.34-39.) In addition, Mr. Estrada asserted that the application of any adverse presumptions violated due process and Idaho's sentencing criteria statute by shifting the burden of proof to the defendant. (Appellant's Brief on Review, pp.28-39.) He did assert

prejudice in regards to the utilization of information that was given in the absence of correct legal advice on the issue of the right against self-incrimination. (Appellant's Brief on Review, pp.28-39.)

The State's position on appeal was that both the Fifth Amendment and Idaho's sentencing law allowed for adverse inferences should a defendant invoke the right against self-incrimination and that Idaho's sentencing criteria statute did not place a burden upon the State to prove anything. (Brief on Review, pp.35-40.)

In reply, Mr. Estrada justified his assertion that the State bore a burden at sentencing, and asserted that even if the State did not have a burden, the evidence that would have been available had he not participated in the psycho-sexual evaluation would not have justified the sentence actually imposed. (Appellant's Reply Brief in Support of Petition for Review, pp.30-35.)

The Supreme Court of the State of Idaho held that Mr. Estrada's trial counsel had rendered deficient performance in failing to inform his client of his right against self-incrimination during a psychosexual evaluation that may support a harsher sentence. (Pet. App. pp.9-13.) As regards the "significance and extent of a defendant's right against self-incrimination," the court held that, "Incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements." (Pet. App. p.11 (citing *Pens v. Bail*, 902 F.2d 1464 (9th Cir. 1990), *Jones v. Cardwell*, 686 F.2d 1464 (9th Cir. 1982), I.C. §19-3003, and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997).) As a general proposition, the court found that, "imposition of a harsher sentence within the statutory

range based on a defendant's statements in a psychological evaluation is a violation of the right against self-incrimination." (Pet. App. p.12.)

In relation to the question of prejudice, the Supreme Court of the State of Idaho's discussion was extremely limited. The court declined to consider whether the sentence imposed was unreasonable or excessive. (Pet. App. p.14.) Instead, the court simply held that, "Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights." (Pet. App. p.14.)

SUMMARY OF ARGUMENT

The State of Idaho has effectively asked this Court to reconsider the application of the right against self-incrimination to sentencing proceedings, as held in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999), in light of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and its progeny. However, *Mitchell* specifically addressed a sentence within the statutory maximum range and a sentencing factor for which it is permissible for judges to exercise discretion, and held that the Fifth Amendment right against self-incrimination forbid taking an adverse inference from a defendant's silence in regards to the factor. Thus, *Mitchell* addresses the application of both the Fifth Amendment and the no adverse inference rule in routine sentencing proceedings, and reconsideration of that holding is not required by *Apprendi, supra,* and its progeny.

In addition, because Idaho Code section 19-3003, which was actually cited by the Supreme Court of the State of Idaho in its determination of the significance and extent of the right against self-incrimination in Idaho sentencing proceedings is sufficient to substantiate that court's conclusion, this Court should not address the Fifth Amendment question as it would only be providing an advisory opinion on that issue.

Further, the State of Idaho suggests that the prejudice finding by the state court could only be based upon a Fifth Amendment analysis. However, the attribution to the Supreme Court of the State of Idaho of an implied finding on the significance of the Fifth Amendment's right against self-incrimination is a speculative reading of that court's holding. The Supreme Court of the State of Idaho made no such explicit finding and, due to the various statutory and constitutional grounds actually argued by Mr. Estrada against such an adverse inference, the assertion of an implied finding on any one issue is simply unfounded.

The State of Idaho has asserted that the petition should be granted because, "Review of the application of the no adverse inference rule at sentencing by courts of various jurisdictions shows that those courts are widely divergent in their conclusions about the scope of the rule." (Pet. p.17.) However, to the extent that the present case even presents the same issue as those cited by the State, review of the case law cited by the State does not support its claim that there is a current conflict of authority.

Finally, because the present case does not directly present the question of whether an adverse inference can be taken from a defendant's invocation of the right against self-incrimination during sentencing proceedings, this case

is not the best case in which to consider that issue. Instead, the question of whether, and to what extent, and under what circumstances, an adverse inference could be taken, should be reserved for a case in which the question was directly presented by a defendant that actually invoked the right against self-incrimination and was punished as a result.

ARGUMENT

A. The State Of Idaho's Assertion That There Are No Opinions Of This Court Which Address The Scope Of The Adverse Inference Rule In Routine Sentencing Proceedings Is Incorrect

The State of Idaho has effectively asked this Court to reconsider the application of the right against self-incrimination to sentencing proceedings, as held in *Estelle v. Smith*, 451 U.S. 454 (1981), and *Mitchell v. United States*, 526 U.S. 314 (1999), in light of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. (Pet. pp.12-13.) As this Court has recognized,

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. *See* B. Cardozo, The Nature of the Judicial Process 149 (1921). Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. *See* Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 854 (1992).

The State of Idaho's assertion that this Court should overrule recent precedent is based upon a faulty premise. As discussed below, neither the right to a jury trial nor the doctrine discussed in *Apprendi* are applicable to the facts of *Mitchell, supra.* Because the holding in *Mitchell* is unaffected by *Apprendi*, the Petitioner's assertion that reconsideration of this Court's established precedent is necessary is unavailing.

According to the State of Idaho,

> if the fact patterns of *Estelle* or *Mitchell* re-occurred they would not be sentencing cases, and there would be no doubt that the defendants would enjoy the privilege against self-incrimination and the benefit of the no adverse inference rule because the state would bear the burden of proving to a jury, beyond a reasonable doubt, the facts at issue in those cases.

(Pet. pp.12-13.) Based upon this premise, the State of Idaho claims that there is no United States Supreme Court precedent which addresses the scope of the no adverse inference rule in routine sentencing proceedings. (Pet. p.13.)

Despite the State of Idaho's representation to the contrary, *Mitchell, supra,* specifically addressed the application of the no adverse inference rule in a routine sentencing proceeding. In *Mitchell*, the defendant pled guilty to, in part, conspiring to distribute five or more kilograms of cocaine. *Mitchell*, 526 U.S. at 317. "The penalty for conspiring to distribute cocaine had a maximum of life imprisonment." *Id.* at 320 (quoting *Mitchell v.*

United States, 122 F.3d 185 (1997)). However, within that range, the sentencing discretion of the district court was limited by applicable mandatory minimum sentences based upon the quantity of cocaine involved. *Id.* at 317. The question presented to this Court was whether, in determining the quantity of cocaine involved, the district court could apply an adverse inference against the defendant based upon her invocation of the right against self-incrimination. *Id.* at 321.

In *Apprendi*, this Court made clear that the application of the holding was limited to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Further, this Court made it abundantly clear that, "nothing in this history suggests that it is impermissible for judges to exercise discretion – taking into consideration various factors relating both to offense and offender – in imposing a judgment *within the range* prescribed by statute." *Id.* at 481. In *Harris v. United States*, 536 U.S. 545 (2002), this Court specifically found that basing a mandatory minimum sentence upon a judicially determined fact "does not evade the requirements of the Fifth and Sixth Amendments." *Id.* at 568. Although a majority did not adopt a single legal basis for this holding, a majority did agree that the mandatory minimum question was based upon a "factor" that "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Id.* at 568; *see also Rita v. United States*, 551 U.S. ___ (2007) (Scalia J., concurring) ("We have repeatedly affirmed the proposition that judges can find facts that help guide their discretion *within* the sentencing range that is authorized by the facts found by the jury or admitted by the defendant.").

Mitchell specifically addressed a sentence within the statutory maximum range and a sentencing factor for

which it is permissible for judges to exercise discretion, and held that the Fifth Amendment right against self-incrimination forbid taking an adverse inference from a defendant's silence in regards to the factor. Thus, *Mitchell* is United States Supreme Court precedent which addresses the application of the no adverse inference rule in routine sentencing proceedings, and reconsideration of that holding is not justified by *Apprendi, supra,* and its progeny.

B. Because An Idaho Statute Cited By The Supreme Court Of The State Of Idaho Supports That Court's Definition Of The Scope Of The Right Against Self-Incrimination In Idaho Sentencing Proceedings, This Court Would Be Rendering An Advisory Opinion On The Fifth Amendment Question Presented

In the petition, the State of Idaho has requested that this Court consider the significance and extent of a defendant's right against self-incrimination under the Fifth Amendment to the United States Constitution. (Pet. pp.10-13.) Relying upon the dissent in *Mitchell v. United States*, 526 U.S. 314 (1999), the majority opinion in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and cases interpreting *Apprendi*, the State has asserted that adverse inferences can be taken from the invocation of the right against self-incrimination in presentence evaluations. (*See* Pet. pp.10-13.) However, because a state statute actually cited by the Supreme Court of the State of Idaho in its determination of the significance and extent of the right against self-incrimination in Idaho sentencing proceedings is sufficient to substantiate that court's conclusion, this Court should not address the Fifth Amendment question.

"It is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that the federal

courts will not give advisory opinions.'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). "Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of [the United States Supreme Court's] refusal to decide cases where there is adequate and independent state ground." *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Because the United States Supreme Court "has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991).

In that portion of its opinion addressing the "significance and extent of a defendant's right against self-incrimination," the Supreme Court of the State of Idaho cited to state law which provides sufficient adequate and independent grounds to justify its holding that in sentencing no adverse inferences can be taken from a defendant's invocation of the right against self-incrimination. (*See* Pet. App. p.11.) In addressing the scope of a defendant's right against self-incrimination in Idaho, the court found that "incrimination is implicated not just when additional charges could be filed, but also when punishment could be enhanced as a result of the defendant's statements." (Pet. App. p.11 (citation omitted).) In so holding, the court relied not only upon authority interpreting the Fifth Amendment to the United States Constitution, but also upon I.C. § 19-3003 and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997). (Pet. App. pp.11-12.)

Idaho Code section 19-3003 provides that a defendant in a criminal action "is not, without his consent, a competent witness for or against himself. His neglect or refusal

to give such consent shall not in any manner prejudice him nor be used against him on the trial or proceeding." I.C. § 19-3003. In relation to this statute, the Idaho Court of Appeals has previously found that "The Idaho Legislature has further codified *and expanded* the scope of the privilege against self-incrimination in I.C. § 19-3003." *State v. Heffern*, 130 Idaho 946, 949, 950 P.2d 1285, 1288 (Idaho Ct. App. 1997) (emphasis added). Pursuant to I.C. § 19-3003, when imposing sentence an Idaho court may not use a defendant's silence to enhance a sentence within penalty range prescribed by statute. *See id.*; *see also Anderson*, 130 Idaho at 769-70, 947 P.2d at 1017-18. When information is disclosed as the result of a violation of this statute, resentencing will be necessary if the information is either "given some weight by the [sentencing court] in imposing sentence," *Anderson*, 130 Idaho at 770, 947 P.2d at 1018, or if it "contributed in some material degree to the court's decision . . . ." *Heffern*, 130 Idaho at 950, 950 P.2d at 1289.

When the Supreme Court of the State of Idaho explicitly relied upon I.C. § 19-3003 and *State v. Anderson*, 130 Idaho 765, 947 P.2d 1013 (Idaho Ct. App. 1997), in defining the significance and extent of an Idaho defendant's right against self-incrimination, the Court recognized that there were state grounds upon which its decision could rest. In light of those grounds, this Court should not issue an advisory opinion formulating a Fifth Amendment rule which is not required by the precise facts of this case.

C. Because The Idaho Supreme Court Did Not Explicitly Address – And Did Not Need To Address – The Adverse Inference Issue The State Raises, This Court Should Not Provide An Advisory Opinion On The Issue

The State of Idaho has asserted that, "What inferences may be drawn at sentencing from a defendant's refusal to assist in a court's efforts to evaluate sentencing factors other than the facts of a crime itself is an important question that can only be answered by this Court." (Pet. p.6.) However, this assertion is not entirely accurate. Because the question of whether an adverse inference can be taken during Idaho sentencing proceedings depends upon a multi-tiered analysis of both state statutory law and federal constitutional law the question cannot "only be answered by this Court." Additionally, because the Supreme Court of the State of Idaho did not explicitly address, and did not need to address, the question under the Fifth Amendment, any such finding by this Court can be nothing more than an advisory opinion on one portion of the multi-tiered analysis.

This Court has long recognized that it will not pass upon constitutional questions that were not either pressed or passed upon in state court. *See Illinois v. Gates,* 462 U.S. 213, 217-224 (1983). In addition, "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 467 U.S. 138, 157 (1984) (citation omitted). Because there is no evidence of the basis of the Supreme Court of the State of Idaho's finding of prejudice, but the briefing presented various grounds to

support that holding, it is unnecessary for this Court to decide the Fifth Amendment issue.

The Supreme Court of the State of Idaho found that Mr. Estrada was prejudiced by his attorney's deficient performance in failing to advise him of his Fifth Amendment right at the time of participation in the evaluation. (Pet. App. pp.13-14.) The Court's ruling on the issue of prejudice was not specific.

> The sentencing judge's specific, repeated references to the psychosexual evaluation suggest that it did play an important role in the sentencing. While we do not pass judgment in any way on whether the sentence actually imposed on Estrada was unreasonable or excessive, nevertheless, Estrada has met his burden of showing that the evaluation played a role in his sentence. Therefore, Estrada has demonstrated prejudice as a result of his attorney's failure to advise him of his Fifth Amendment rights.

(Pet. App. pp.13-14.)

The State of Idaho claims that this holding was a rejection of the post-conviction court's holding that "there was no prejudice because Estrada's failure to cooperate in the evaluation would have led to permissible adverse inferences in sentencing. . . ." (Pet. p.4.) The State of Idaho appears to also believe that the prejudice finding could only be based upon a Fifth Amendment analysis. It argues that, "The Supreme Court of Idaho has expanded the holdings of *Estelle* and *Mitchell* beyond their stated limitations, effectively forbidding taking any adverse inference from a defendant's decision to not cooperate with presentence evaluations." (Pet. p.13.) However, the attribution to the Supreme Court of the State of Idaho of an implied

finding on the significance of the Fifth Amendment's right against self-incrimination is a speculative reading of the state court's holding. The Supreme Court of the State of Idaho made no such explicit finding and, due to the various statutory and constitutional grounds actually argued by Mr. Estrada, the assertion of an implied finding on any one issue is simply unfounded.

On appeal, Mr. Estrada did not concede that he would have received the same sentence had any permissible adverse inferences been taken from his silence. Instead, Mr. Estrada repeatedly asserted he had alleged facts which established a probability that he would have received a lesser sentence. (Appellant's Brief, pp.13-16; Appellant's Brief on Review, p.38; Appellant's Reply Brief in Support of Petition for Review, pp.28-29.) In addition, Mr. Estrada asserted that the district court erred in finding that his silence would justify an adverse inference regarding remorse and taking responsibility for the crime. He asserted that the inference was improper because he actually pled guilty to the charges against him, thus admitting factual guilt long before sentencing, and took full responsibility for his actions in the presentence investigation report. (Appellant's Brief pp.12-13; Appellant's Brief on Review, pp.32-33.)

In addressing the prejudice prong of the *Strickland v. Washington*, 466 U.S. 668 (1984), analysis, the Supreme Court of the State of Idaho recognized that Mr. Estrada had to establish "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (Pet. App. p.13.) The court further recognized that a reasonable probability "'is a probability sufficient to undermine confidence in the outcome.'" (Pet. App. pp.13-14.) In light of the arguments

made regarding prejudice, one appropriate reading of the court's recognition that the specific and repeated references to the report suggested that it "did play an important role in the sentencing," is that the appellate court recognized that the psychosexual report was so damaging to Mr. Estrada that there was a reasonable probability that, even if any adverse inferences could appropriately be taken, there is a reasonable probability that the report caused the sentencing court to impose a harsher sentence than it otherwise would have.

Alternatively, in his initial briefing, Mr. Estrada did assert that the district court erred in holding that the Fifth Amendment right against self-incrimination did not forbid taking adverse inferences from an assertion of the right. (Appellant's Brief, p.9.) Further, in both his initial briefing and in the petition for review briefing Mr. Estrada asserted that under state sentencing statutes, the State bore the burden of proof of certain statutory sentencing factors, and the application of any presumptions in regards to these factors based upon an adverse inference taken from Mr. Estrada's invocation of his right against self-incrimination would violate his Fourteenth Amendment right to due process as well as Idaho sentencing statutes. (Appellant's Brief, pp.16-22; Appellant's Brief In Support Of Petition For Review, pp.28-39.)

The State of Idaho's claim that the Supreme Court of the State of Idaho made an implied finding on the appropriateness of taking an adverse inference from silence presupposes that, without discussion or citation to authority, the court held that not only could such an inference be appropriately taken under the Fifth Amendment, but also appropriately taken under the Fourteenth Amendment and under Idaho's statutory sentencing scheme. Mr. Estrada submits that, absent *some* indication that the

court ruled on these issues, the necessary logical leap suggested by the State of Idaho is unwarranted.

Finally, the Supreme Court of the State of Idaho relied upon I.C. § 19-3003 in holding that there is a right against self-incrimination in Idaho sentencing proceedings. (*See* Pet. App. pp.11-12.) This statute not only creates a right against self-incrimination, it also forbids the taking of an adverse inference from the invocation of that right." *See Anderson,* 130 Idaho at 770, 947 P.2d at 1018 (applying "the statute's unambiguous directive that a defendant's refusal to testify may not prejudice him or be used against him in the criminal proceeding" to a sentencing proceeding.) The Supreme Court of the State of Idaho also cited to the exact page of the *Anderson* opinion which recognized the no adverse inference rule when it relied upon the case to find the existence of the right against self-incrimination.

Pursuant to principles of judicial restraint, the Supreme Court of the State of Idaho does not reach constitutional challenges in an appeal if the issue can be determined on statutory grounds.

> When a case can be decided upon a ground other than a constitutional ground, the Court will not address the constitutional issue unless it is necessary for a determination of the case. *Poesy v. Bunney,* 98 Idaho 258, 561 P.2d 400 (1977); *Swensen v. Buildings, Inc.,* 93 Idaho 466, 463 P.2d 932 (1970). The Court has declined to address constitutional issues on appeal when the matter can be determined on statutory grounds. *See e.g. State v. Young,* 122 Idaho 278, 283, 833 P.2d 911, 916 (1992) ("In light of our disposition on statutory grounds, we have no occasion to determine the parameters of the right to appointed

> counsel at probation revocation proceedings under our state constitution."); *Smith v. Dep't of Employment,* 100 Idaho 520, 521, 602 P.2d 18, 19 (1979) ("We do not reach the state constitutional issue raised by claimant Smith because we conclude that the statute does not bar receipt of unemployment compensation benefits by claimant Smith.").

State v. Doe, 140 Idaho 271, 273, 92 P.3d 521, 523 (Idaho 2004).

Importantly, the Supreme Court of the State of Idaho has previously explicitly refused to reach a claim that admission of psychiatric evidence at sentencing violated the defendant's rights under the Fifth Amendment of the United States Constitution specifically because the issue could be resolved by application of state evidentiary privilege rules. *See State v. Wilkins*, 125 Idaho 215, 219, 868 P.2d 1231, 1235 (Idaho 1994); *see also State v. Young*, 122 Idaho 278, 283, 833 P.2d 911, 916 (Idaho 1992) (holding that the Supreme Court of the State of Idaho "will not rule on a constitutional issue unless it is necessary to resolve the case.").

In light of the clear holding in *Anderson*, and the Supreme Court of the State of Idaho's citation to that exact page, it seems unlikely that the court ever reached the federal constitutional question presented by the State of Idaho. Furthermore, when the court's holding on prejudice is compared to the remedy for a violation of I.C. § 19-3003, the import of that statute on the opinion is clear. In the present case, the court found that "Estrada has met his burden of showing that the evaluation played a role in his sentence." (Pet. App. p.14.) Similarly, and as previously noted, when information is disclosed as the result of a

violation of I.C. § 19-3003, resentencing will be necessary if the information is either "given some weight by the [sentencing court] in imposing sentence," *Anderson*, 130 Idaho at 770, 947 P.2d at 1018, or if it "contributed in some material degree to the court's decision . . . ." *Heffern*, 130 Idaho at 950, 950 P.2d at 1289.

Only if the Supreme Court of the State of Idaho first found that there were no state statutory grounds which prevented taking an adverse inference would the court have reached the federal constitutional questions, including the one now raised by the State in its Petition for Writ of Certiorari. Based upon the briefing in this case as well as the authority relied upon by the Supreme Court of the State of Idaho, there were various grounds upon which the state court may have found that Mr. Estrada was prejudiced by his attorney's deficient performance, including a possible violation of I.C. § 19-2521, the Idaho sentencing criteria statute, a possible violation of I.C. § 19-3003, the Idaho statute which expands the scope of the privilege against self-incrimination, the due process clause of the Fourteenth Amendment, or the Fifth Amendment right against self-incrimination. However, the court did not identify any of these as the actual basis of its ultimate holding, and the State of Idaho now asks this Court to consider only one of these rationales. Because the Fifth Amendment claim was not the only possible grounds for prejudice briefed by the parties, nor even the most likely ground reached by the state court, any claim that such a finding is implied by the opinion is speculative at best.

For prudential reasons, the United States Supreme Court will not review judgments of state courts that rest on adequate and independent state grounds. *See, e.g., Michigan v. Long*, 463 U.S. 1032, at 1041-42 (1983). It is

incumbent upon the Court to ascertain for itself whether an adequate and independent state ground adequately supports the state court's judgment. *Id.* at 1038 (citing *Abie State Bank v. Bryan,* 282 U.S. 765, 773 (1931)). In doing so, when,

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41.

In the present case, the Supreme Court of the State of Idaho did not explicitly articulate the basis for its holding that Mr. Estrada was prejudiced. Nevertheless, the adequacy and independence of the state law ground is clear from the face of the state court opinion. In the absence of at least some indication that the state court was rejecting the State's Fifth Amendment argument, it cannot be said that the decision fairly appears to rest primarily on the question presented by the State in the Petition for Certiorari, or even to be interwoven with the question presented. Instead, the finding of prejudice may be based upon many different claims made by Mr. Estrada, including Idaho statutes.

Because the State's attribution to the Supreme Court of the State of Idaho of an implied finding on the question of whether an adverse inference can be drawn from an invocation of the right against self-incrimination is merely an assumption, any resolution of the claim raised by the

State would be an advisory opinion. Even if this Court were to correct any alleged state court view of the Fifth Amendment, the Supreme Court of the State of Idaho's interpretations of Idaho statutory sentencing law, the due process clause of the Fourteenth Amendment, and the application of Idaho Code section 19-3003 would have to be considered, likely leading to the same result in the present case.

D. Review Of The Case Law Cited By The State Of Idaho Does Not Support Its Claim That There Is A "Widely Divergent" Conflict Of Authority Necessitating The Granting Of The Petition Of Certiorari In This Case

The State of Idaho has asserted that the Petition for Writ of Certiorari should be granted because, "Review of the application of the no adverse inference rule at sentencing by courts of various jurisdictions shows that those courts are widely divergent in their conclusions about the scope of the rule." (Pet. p.17.) However, to the extent that the present case even presents the same issue as those cited by the State, review of the case law cited by the State does not support its claim that there is a conflict of authority on current law.

1. This Case Does Not Provide A Proper Vehicle To Address The Question Of Whether A Defendant Can Invoke His Right Against Self-Incrimination And Still Receive A Reduced Sentence

One part of the three-pronged split of authority alleged by the State of Idaho is "courts that allow a sentencing court to draw inferences from a defendant's silence

in declining to find downward adjustments of a sentence, but do not allow inferences that would increase the sentence." (Pet. pp.16-17.) While this line of authority clearly exists, because Idaho has an indeterminate sentencing scheme which does not require proof of any facts to justify a reduced sentence, this case is not a proper vehicle to address the propriety of that line of authority.

The United States Supreme Court "'has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.'" *United States v. Raines*, 362 U.S. 17, 21 (1960) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885)). In the exercise of this jurisdiction, the United States Supreme Court is bound by the rule that it will never "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Id.*

In addressing the case at bar, this Court would not be required to formulate a rule on whether courts can allow a sentencing court to draw inferences from a defendant's silence in declining to find downward adjustments of a presumptive sentence because Idaho's sentencing law does not provide for such a procedure. As was recognized by the Supreme Court of the State of Idaho, Mr. Estrada was convicted of rape. (Pet. App. p.1.) In Idaho, "Rape is punishable by imprisonment in the state prison not less than one (1) year, and the imprisonment may be extended to life in the discretion of the District Judge, who shall pass sentence." I.C. § 18-6104. Idaho's statutory sentencing scheme is "an 'indeterminate' sentencing system in which the defendant is given a sentence with a minimum

and a maximum." *State v. Stover*, 140 Idaho 927, 931, 104 P.3d 969, 973 (Idaho 2005) (citing I.C. § 19-2513). In determining the maximum sentence that may be imposed for a crime, "the maximum is not determined by the trial judge, but is set by law." *Id.* (citing I.C. § 19-2513). The sentencing scheme "requires no findings of fact . . ." *Id.* (citing I.C. § 19-2521). In determining the appropriate sentence to impose in any case, "The legislative history and statutory language are clear in stipulating that the district court's decision-making process should include a review of I.C. § 19-2521 criteria but the district court's own discretion or opinion is the final authority." *Id.* at 932, 104 P.3d at 974. As regards the granting of probation, a "sentencing court has inherent power to suspend a sentence" and "Idaho Code § 19-2521 does nothing to infringe upon the sentencing court's inherent power to impose or suspend a sentence." *Id.* at 932, 104 P.3d at 974. Finally, "Idaho's review of sentences is under an abuse of discretion standard and is not dependent upon [a] specific fact finding enforced statute." *Id.*

The State of Idaho is correct that there are cases in which the courts have held that a defendant cannot stand silent and meet his burden of justifying a downward adjustment to his sentence. (*See* Pet. pp.16-17 (citation omitted).) However, whether this is appropriate is not presented in the case at bar because Idaho's indeterminate sentencing law does not provide for downward departures from a presumptive sentence. Because the facts of this case do not present the question of whether a downward departure of a presumptive sentence can be withheld based upon a defendant's invocation of the right against self-incrimination, this Court will not have jurisdiction to

decide that issue even if it were to grant the Petition for Writ of Certiorari.

2. Three Of The Five States Which The State Of Idaho Asserts Limit The No Adverse Inference Rule To The Facts Of The Crime Have Not Actually Done So

In support of its claim that there is a "widely divergent" conflict of authority, the State of Idaho cites a series of cases which the State claims either directly limit the no adverse inference rule, or supports that proposition. (Pet. p.16.) However, review of the cases cited does not support the State's assertion.

The State of Idaho relies upon *State v. Spencer*, 70 P.3d 1226 (Kan. Ct. App. 2003). A review of *Spencer* shows that the issue before that court was "not the extent of the sentence to be entered." *Id.* at 1229. In fact, the presumptive sentence in that case was probation, which is exactly the sentence that was imposed. *Id.* at 1227. Rather, the issue presented was what terms of probation could be imposed upon the defendant. *Id.* at 1229. Although that court did distinguish *Mitchell* it did not impose a harsher sentence based upon the invocation of the right against self-incrimination. See *id.* at 1229. However, as was specifically discussed in *Spencer*, the Court of Appeals of Kansas has addressed the question of whether a defendant can be given a harsher sentence based upon the invocation of that right. *Id.* (citing *State v. Aikman*, 26 P.3d 1276 (Kan. Ct. App. 2001)). In *Aikman*, the appellate court found that the sentencing court had "made a negative inference from Aikman's refusal to disavow affiliation with [a gang]." *Aikman*, 26 P.3d at 1279. The court vacated the sentence holding that, "A sentencing hearing is part of the criminal

case, and the concerns mandating the rule against negative inferences at trial apply with equal force at sentencing." *Id.* Thus, the Kansas court's precedent is not in conflict with the holding the State of Idaho asserts is implied by the Supreme Court of the State of Idaho's opinion.

Neither does *People v. Brady*, 765 N.E.2d 289 (N.Y. 2002), support the State of Idaho's assertions. Just as with *Spencer*, in *Brady* the court did not actually address the question of whether an adverse inference could be taken from a defendant's invocation of the right against self-incrimination. Rather, the court addressed whether a defendant who took the stand during a criminal trial could be questioned about a separate pending case in which the defendant had admitted facts and pled guilty. *Id.* at 290. The Court of Appeals of New York found that the defendant could have been cross-examined to the extent of his previous admissions during the guilty plea hearing. *Id.* at 291-92. In so holding, the court distinguished *Mitchell* only to the extent it noted that there was the possibility of incrimination in *Mitchell*, and the limitations on the scope of cross-examination of Brady had removed any possibility of incrimination. *Id.* at 292. Thus, *Brady* did not address the question here.

The State of Idaho also relies upon *State v. Heffran*, 384 N.W.2d 351 (Wis. 1986). However, like *Spencer* and *Brady*, the Supreme Court of Wisconsin did not address the question of whether an adverse inference could be taken from a defendant's invocation of the right against self-incrimination. The question in *Heffran* was whether a presentence interview was accusatory in nature such that a defendant was entitled to be informed of his *Miranda* rights prior to participating. *Id.* at 352-53. In this case

which predates *Mitchell*, the court was not presented with an instance where the defendant invoked his right to silence, but rather an instance where the defendant made a series of admissions to past criminal conduct. *Id.* at 352-353. Thus the question of whether an adverse inference could be taken from silence was not at issue. *But see State v. Ernst*, 699 N.W.2d 92, 104 n.12 (Wis. 2005) (declining to extend *Mitchell* to collateral attacks on a conviction and noting in dicta that "other courts have declined to extend *Mitchell* to situations involving sentence enhancements, where there is no inquiry about the factual details of the underlying crime.").

Because neither *Spencer, Brady*, nor *Heffran* actually addressed the question presented in the present Petition for Writ of Certiorari, they do not support the State of Idaho's assertion that there is a "widely divergent" conflict of authority necessitating the granting of the present petition.

3. Because The Two States Which Have Held That Adverse Inferences Can Be Taken In Regards To Facts Other Than Facts Of The Crime Predate This Court's Opinion In *Cunningham v. California* They Do Not Provide A Current Conflict Of Authority

Courts in two states have previously held that an adverse inference can be taken from a defendant's assertion of the right against self-incrimination in regards to facts other than facts of the crime. *See Lee v. State*, 36 P.3d 1133 (Wyo. 2001) and *State v. Muscari*, 807 A.2d 407 (Vt. 2002). However, both of these cases predated this Court's decision in *Cunningham v. California*, ___ U.S. __, 127 S.Ct. 856 (2007). *Cunningham* confirms that the holding

in *Mitchell* applies to all types of facts, not simply the facts of a crime. This Court held in *Cunningham* that the Constitution treats *all* sentence-enhancing facts (other than the fact of a prior conviction) the same, regardless of whether they relate strictly to offense conduct – like the factors at issue here – to the offender himself. *See Cunningham*, ___ U.S. at ___, n.14, 127 S.Ct. at 869, n.14 (holding that "*Apprendi,* itself, however, leaves no room for the bifurcated approach . . . '*Any* fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"). Thus, any conflict of authority based upon treating factors differently depending upon whether they relate to the facts of the crime or relate to the offender must be reconsidered in light of this Court's decision in *Cunningham*. The states of Wyoming and Vermont should be given the opportunity to reconsider their previous holdings in light of *Cunningham*, and other states should have the opportunity to consider the import of *Cunningham*, prior to a determination that there is a conflict of authority on the current law.

E. Review Of The Question Presented Should Be Reserved For A Case In Which A Defendant Actually Invokes The Right Against Self-Incrimination And Was Punished As A Result

In the present case, Mr. Estrada was not able to actually remain silent. Neither has a sentencing court actually taken an adverse inference from his silence. Importantly, he has not yet had the effective assistance of counsel at a sentencing hearing such that he can address the question of whether any adverse inferences are justified under

the facts of his case. Rather, as a collateral attack to a conviction, this case requires a noetic endeavor into what would have happened if Mr. Estrada would have had effective assistance of counsel and would have invoked the right. Because the present case does not directly present the question of whether an adverse inference can be taken from a defendant's invocation of the right against self-incrimination during sentencing proceedings, this case is not the best case in which to consider that issue. Instead, the question of whether, and to what extent, and under what circumstances an adverse inference could be taken, should be reserved for a case in which the question was directly presented by a defendant that actually invoked the right against self-incrimination and was punished as a result.

CONCLUSION

For the reasons set forth above, the respondent herein submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

MOLLY J. HUSKEY*
Idaho State Appellate Public Defender
3647 Lake Harbor Lane
Boise, ID 83703
(208) 334-2712
Attorney for Respondent

**Counsel of Record*